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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963

No. 48

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

JAMES M. PENNINGTON, RAYMOND E. PHILLIPS and LILLIAN GOAD PHILLIPS, Admx. of the Estate of Burse Phillips, Deceased.

REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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No. 927.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Because of the National Labor Policy and the exemption of labor unions under the Sherman Anti-Trust Act, should this Court upset a jury verdict, sustained by the Trial Court and the Court of Appeals, finding that a labor union has conspired and combined with a business group for the purpose of promoting the interests of the business group in restraining competition in, or to monopolize the marketing of, goods in interstate commerce, where (a) the formation of such combination was directly

related to discussions about the means of stabilizing prices and production in the industry, (b) the combination has adopted, to carry out its purposes, not only the imposition of industry wide terms pertaining to wages and employee benefits which create unfair and unreasonable advantages to the business group as against competitors because of geographically induced disparity in methods of production, but also boycotts and predatory price-cutting practices directed at the principal market of Respondents, (c) the Union participated in the business group as owner and investor with respect to one of the principal companies composing the business group, supporting that company financially while it was engaged in the aforesaid predatory price-cutting practices, and (d) all of the damages awarded Respondents resulted from the effect of such predatory pricing practices?

2. Was it error for the Trial Court to admit evidence on the question of Petitioner's purpose and intent, which evidence showed that the Petitioner and members of the business group worked together to obtain a minimim wage determination in the industry under the Walsh-Healey Act, for the purpose of benefiting the business group and restraining the competition of Respondents and other similarly situated with respect to Respondents' principal market, the TVA coal market, where such activity related to only one phase of the conspiracy and damages awarded Respondents did not result from this particular phase?

STATEMENT OF FACTS.

Respondents cannot agree with the statement of facts presented in the petition, pages 7 through 23. The statements there contained represent only isolated fragments of the facts proven at the trial and limited extracts from the Opinion of the Court of Appeals. No attempt what-

soever is made by Petitioner to discuss the full scope of the case, particularly the heart of the case wherein Petitioner involved itself on the economic or commercial side of the industry, other than a bare reference to the fact that it had made some investments in the industry.

Petitioner would have a case for the issuance of the writ were the real questions and facts simply as stated by Petitioner. It would shift the burden upon Respondents to incur considerable expense in presenting a fair statement of facts, as occurred in the Court of Appeals where Respondents needed seventy-three printed pages to set the facts straight as to the nature of the conspiracy charged and proven. Respondents feel justified in setting forth below a portion of the statement of conspiracy contained under Respondents' theories in the Pre-Trial Order (50a-56a), which statement was read to the jury in the Court's charge as being the conspiracy charged by Respondents (1538a-1543a). Since Petitioner has not seen fit to go into the facts in its petition, suffice it to say here that each portion of this statement is abundantly supported by facts in the record:

> "A. Background of the Conspiracy.
>
> "After World War II the economics of the bituminous coal industry became unstable by reason of the fact that there was more coal being produced than the markets required; before 1950 the major coal producers and the Union were in agreement that the major problem of the industry was over-production and that the growth of small, independent and non-Union producers was contributing to the problem; the major companies and the Union disagreed on how the problem should be handled in the period immediately subsequent to World War II; on its side the Union was contending that the answer was to cut down on the working time of all producers; the UMW

urged a three-day work week; for many months before the 1950 contract was signed the UMW took the initiative on this question and directed the working time of the men in the industry, the Union Officials setting on some weeks three-day work weeks and at other times no-day work weeks; domination of the men in the industry was an essential part of the Union's effort to dictate the economics of the industry and this domination was interfered with by the passage of the new Taft-Hartley Act; the Union's efforts to maintain closed shops and maintain a Union controlled Welfare Fund were challenged and in some instances were defeated in the courts by the major coal companies; the major coal companies were opposed to the UMW's dictating the work time of the men in the industry because it cut into their profits.

"B. Formation of the Conspiracy.

"A marked change occurred in the relations between the UMW and the major coal companies in 1950, as disclosed in their bargaining relations before and after that year; the express understanding at the time of the signing of the 1950 National Bituminous Coal Wage Agreement was that the major coal companies, themselves, were to decide on the working time for their employees; this was a surrender on the part of the UMW of its previous policy of seeking to control the economics of the industry by controlling the working time; the understanding was that the problem of stabilizing the economics of the industry, the problem recognized by both the UMW and the major coal companies, was to be taken care of by eliminating the smaller and weaker companies in great numbers, leaving the industry to the major coal companies alone.

"C. Use of the National Bituminous Coal Wage Agreement in the Conspiracy and Evasion of the Taft-Hartley Act.

"The conspiracy involved the use of the National Bituminous Coal Wage Agreement of 1950, and its successive amendments as an instrument in accomplishing the purposes of the conspiracy; the accomplishment of the purposes of the conspiracy was furthered by the domination of the UMW over the men in the industry and in 1950, by the express statement of the representatives of the major coal companies the Welfare Fund was turned over to the Union's control and rather than opposing the UMW's efforts to evade the Taft-Hartley Act as they had before, the major coal companies have fostered the UMW's domination of the men of the industry so that the terms of the National Bituminous Coal Wage Agreement would be imposed upon the small mines; by successive amendments to the Uniform National Bituminous Coal Wage Agreement's terms the wage scale and the Welfare Fund royalties per ton were raised to exceedingly high levels; the mechanization program of the major coal companies was to go ahead rapidly and the successive increases in the wage scale and Welfare Fund payments were designed and tailored to meet the abilities of the major coal companies to mechanize and not have their profits affected by the increasing labor costs in the successive amendments; the successive amendments to the labor contract were made after careful consideration of the abilities of the major coal companies to make the increases without affecting their profits; the Union had no concern as to whether the weaker companies could pay; the UMW displayed knowledge that the weaker companies could not pay and that they would fall by the wayside by reason of the in-

creased terms; the Union favored the taking over of the industry by the combines of coal producers and the Union worked toward this end; the campaign to impose the wage contracts upon the smaller, independent and non-union mines was intense after 1950; in areas of strong resistance mobs and terrorism were used; . . . the finances of the Union and the finances of the major coal companies have been used to further the drive to bring all production under the National Bituminous Coal Wage Agreement; one or more major coal companies have assisted in crushing the opposition of the principal competitor of the UMW in the bituminous coal labor fields; the result of this conspiracy and these activities has been that large numbers of small companies have been driven out of the industry and that thousands of men in the industry have been driven into unemployment; when these men are put out of the industry they cease to participate in Welfare Fund benefits and the Fund remains as a source of benefit for the employees only of those companies that survive.

"D. Use of Boycotts.

"To accelerate the demise of the smaller companies devices were inserted into later amendments of the National Bituminous Coal Wage Agreement to further restrain their trade; companies which could not afford to pay the wage scale in terms of the contract were barred from operating on the lands of signatories to the contract; the major companies have acquired great tracts of the coal lands of the country and there is little good coal land left for the small companies to operate upon; the small companies were prohibited from selling coal to the signatories to the contract, including the major companies which supplied coal to the large markets under large contracts.

"E. The TVA Market.

"The development of the Tennessee Valley Authority as the principal coal purchaser of the entire country called the attention of the conspirators to the Southern Appalachian region when TVA opened up many of its coal-using generating units in 1954, 1955 and 1956; in 1955 the conspirators manifested their intent and purpose to take over the TVA market by working together with the Secretary of Labor to obtain a determination of a minimum wage in the bituminous coal industry under the Walsh-Healey Act; the purpose was to drive out of the government market, particularly the TVA market, the small coal producers; this determination imposed a wage rate upon a producer of coal supplying coal to a government market twice as high as the wage rate determined by the Secretary of Labor in any other industry; in accordance with this design this determination of a minimum wage effectively barred Phillips Brothers from participating in the term market of the TVA because they could not pay the kind of wages set forth in that determination; because contracts for less than $10,000 were exempted from the minimum wage determination, Phillips Brothers was able to ship coal on TVA spot orders; the conspirators set about to eliminate or drastically reduce the spot market of TVA; when this effort failed to bring results the conspirators adopted the practice of predatory pricing to drive the spot coal market price down to a price which a small producer could not meet at a profit; in this phase of the campaign the West Kentucky Coal Company and its subsidiary Nashville Coal Company, took the most prominent part; the Union had over $25,000,000 of risk capital invested in these companies; large amounts of tonnage were

dumped upon the spot coal market of TVA at constantly reduced prices; the spot coal price was beaten down to such extent that Phillips Brothers suffered large losses in trying to retain their position in that market and finally had to abandon their sale of coal to that market and it became necessary for them to abandon the partnership business.

* * * * * * * *

"The Union in carrying on the foregoing activities pursuant to its understanding and agreement with the major coal companies was not acting alone to further its own interests as an organization of wage earners but was aiding, abetting and cooperating with business men in an effort to restrain trade of small coal companies and to monopolize the industry for the major coal companies; the conspiracy involved boycotts and a purpose to stabilize the prices of coal in the industry; the practices used pursuant to the conspiracy particularly the imposition of the constantly increasing terms of the National Bituminous Coal Wage Agreement upon the small coal companies, such as that of Phillips Brothers, and the price-cutting practices of the conspirators on the markets supplied by Phillips Brothers were unreasonable."

Respondents take particular exception to certain of the isolated "facts" that Petitioner has included in its statement. At the top of page 14, Petitioner states that the employees of Respondents "voluntarily joined UMW." The error in this statement may be seen by referring to pages 50-53 of Respondents' petition in Case No. 867, now before this Honorable Court.

At page 14, Petitioner states "undisputed are the denials" of UMW officers of any understanding or agreement pertaining to pricing of coal or operation of mines.

Particular reliance has heretofore been placed by Petitioner on the statement of Mr. Lewis in reply to the question of whether he had been a party to any agreement with reference to the pricing of coal (1139a-1140a):

> "I have not, neither in an individual capacity nor in an official capacity, as representative of the Union, nor other labor organizations when I was representing other labor organizations."

On the record this denial was not correct. UMW sponsored, and was responsible for, the stabilization agreement in the anthracite industry between UMW and major anthracite operators (312a-313a). In 1948 Mr. Lewis viewed with alarm the then tendency of the bituminous industry to over produce for the existing market. UMW having made over-production an issue in the anthracite industry and having sponsored the stabilization of production agreement in that industry, Mr. Lewis stated in 1948 that it was a matter of prime importance that the bituminous industry follow suit. Mr. Lewis stated:

> "If the operators of this country can't give any leadership on the commercial side of this industry, the United Mine Workers of America can and will.
>
> "So next year, in 1949 or at any other time, when evil days come upon this industry, you will find the United Mine Workers of America moving in, and if there are only three days' work in this industry we will all have the three days' work" (313a).

In the first sessions of the bargaining conferences of 1949-50 in bituminous, Mr. Lewis urged the anthracite plan upon the bituminous operators. Mr. Lewis stated:

> "The Mine Workers have gazed at some degree with admitted apprehension at the tendency of the industry to reduce their prices in the face of in

creasing competition. Frankly, we think the industry has been too hasty" (314a-315a).

UMW imposed the limited work weeks in 1949-1950 for one reason:

> "The equitable distribution of work opportunity in the coal industry and the desire of the United Mine Workers to have the work opportunity more equitably distributed" (314a-317a).

In 1949 UMW declared:

> "'Divide the orders, share the work program, is now a must in the soft coal industry. Since the coal industry of its own accord cannot get together and exhibit the business acumen necessary to protect its employees and the business and population of the mining communities, the duty of performing this public service devolves upon the only stabilizing force the industry has ever known—the UMWA" (24-25 of the Supplemental Appendix Volume in Case No. 867).

The major coal operators bitterly opposed the Union's method of stabilizing production in the industry because it hurt them in their pocketbooks (387a-388a). This was part of the background of the 1950 Agreement.

At pages 11-12 Petitioner states that the conclusions of the lower courts with respect to the investment of Petitioner in West Kentucky Coal Company and Nashville Coal Company and its use of those investments were "contradicted by undisputed facts." Petitioner does not take up any consideration of the factual matter pertaining to this question in its petition and supposedly it is not seeking a writ of certiorari upon this question. However, this was a matter that occupied a very large portion of the record.

Petitioner obtained possession of all of the preferred stock of West Kentucky Coal Company and 480,000 shares of a total outstanding issue of 857,264 common shares (499a, 591a, 1639a). For a substantial part of the case Petitioner insisted that most of these investments constituted loans and the coal company stocks were merely security for these loans. After a considerable amount of probing of the witnesses Lewis, Eaton and Colton, and because of the peculiar character of the notes evidencing the advancement of Union funds, Mr. Lewis conceded that Petitioner had entered into a joint business enterprise with Mr. Eaton in connection with these coal company investments and that Mr. Eaton was not requested to risk any of his own money and that it was expected that Petitioner would share in the profits from this venture the same as a partner in any joint business enterprise (1125a). Mr. Lewis conceded that UMW expected to make an immense profit from these investments (493a).

The oft repeated statements by UMW officers that the investments in these coal companies were made to give employment in the coal industry and to lift the employees of the companies out of their previous servitude were cancelled by the testimony of the president of the company who testified that, since the Union investments were made, the employment of the companies has constantly declined and further that, before the Union contract was signed upon UMW's acquisition of the company, the wage scale and welfare benefits paid by the Company were equal to or greater than that under the UMW contract (615a-618a). Mr. Lewis had no logical response when asked about this testimony (1164a-1165a).

Under UMW's ownership these companies switched from operations at substantial profits to loss operations while engaged in price-cutting practices on the TVA market (590a, 609a, 1461a, 1652a-1655a). The damage to

Respondents was manifest (858a-862a). In the course of these dealings and at the request of the West Kentucky Coal Company, United Mine Workers obtained a bank loan for the company in the amount of $5,200,000 with the pledge of Union assets to secure the loan (501a).

After the lengthy struggle between the major coal companies and Petitioner in the period prior to 1950, the changes were made in the 1950 contract and in the amendments thereafter, which an abundance of proof shows were slanted and tailored to give overwhelming advantage to the intensely mechanized mines over the thin-seamed small mines in which intense mechanization was impossible. There was the plainly expressed knowledge of Petitioner that these smaller operators would fall by the wayside so that the major coal combines would take over the production of coal in the country.

Petitioner resorts at pages 14-18 of the petition to the argument that a court injunction required Petitioner to deal with the major coal companies in collective bargaining in 1950. The courts and the federal agencies which initiated those proceedings cannot be held responsible. They were concerned solely with the employer-employee relationship between an organized group of employers and a bargaining representative of their employees. It is not reasonable to say that these public agencies were apprised of all understandings reached by the negotiating parties in 1950, or of how those understandings would be implemented in the succeeding years. These agencies were concerned with the making and the validity of the written agreement executed in 1950. They were not authorized or empowered to determine if there were any other understandings or agreements not expressed in that collective bargaining agreement.

Petitioner's contention at pages 16-17 that mechanization was inevitable in the industry and that UMW did

not and could not oppose mechanization because of the free enterprise system and the recognition of management prerogatives does not reply to the obvious fact that UMW was forcing rapid, intense mechanization in spite of the inabilities of the thin-seam mines in the Appalachians, particularly in Tennessee, to attain such mechanization.

The effect of UMW's drive to force mechanization is reflected in the statistics of employment in the industry. In 1949 there were 433,698 men gainfully employed in the bituminous coal industry (1724a). In 1960 there were 160,200 men employed in the industry (1217a).

Respondent was a mechanized company, engaged in strip-mining. But its methods of operation in the seams of coal and in the terrain of East Tennessee could hardly be compared with the type of operations found elsewhere (478a-479a, 484a-485a, 735a, 476a, 477a, 735a, 736a-737a, 487a, 599a, 1136a). The impossibility of using high productive equipment on the mountainous terrain and thin seams of East Tennessee is evident even from the statistics of the Bureau of Mines (1315a, 1664a, 1665a, 1666a, 1721a, 1722a).

The scarcity of thick, mechanically workable coal in Tennessee (1664a) and the application of the "land-lease" clause in UMW's contract (680a) leaves little coal land to the small operator in this part of the country. Respondent operated at small profits in its first years but operated at substantial losses in 1957 and 1958 (1591a, 206a-207a, 218a-219a).

Petitioner states at pages 17-18 that its settlements with Bituminous Coal Operators Association have promoted industrial peace on a national basis. But, as pointed out in the Opinion of the Court of Appeals in its discussion of the violence attendant upon UMW's drives in the Southern Appalachian region, there has been no peace here, as

UMW polices its thousands of hungry former members to keep them out of mines that cannot possibly pay the terms of the national contract. The UMW is compelled to take these police actions by the protective wage clause in its contract (1205a) to keep the men out of mines in the whole area where the contract cannot be met and to see that the coal from those mines will not find a market. From the standpoint of virtually all of the miners of the area this could hardly be called a traditional labor union policy by the Union which represents, or formerly represented, them.

Multi-million ton long term contracts acquired by large coal companies now supply the bulk of the coal market (404a-405a, 408a, 715a-716a, 1271a, 487a-488a). As an example, the most important market today, the electric utility market, makes such large contracts in order to fix and determine costs (a) to sell debentures needed to pay for new steam plants and (b) to govern the establishment of electricity rates (1357a-1358a). The practice of major coal companies buying coal from smaller companies to apply on term contracts with the major markets is barred by the protective wage clause unless the small company has the ability to pay the labor cost in the UMW contract. Mr. Lewis demonstrated the dependence of smaller companies on sales to major companies as far back as 1949 (320a-323a). The major companies have had the practice of frequently buying coal from other companies (1264a, 1360a). This market has been eliminated for those companies that operate under conditions that make it impossible to live up to the UMW contract.

REASONS FOR DENYING THE WRIT.

I. No Purpose Would Be Served by Issuing the Writ With Respect to Petitioner's First Question. The Question as Presented Is Academic in This Case.

The first question posed in the petition is: May a labor union be held a conspirator under the Sherman Anti-Trust Act where it has achieved an industrywide, multi-employer collective bargaining agreement, negotiated in accordance with procedures established by law, which results in stabilizing wage rates and working conditions at levels above the ability of some employers to pay?

By this question Petitioner seeks to put the whole case into a simple proposition which answers itself automatically in the negative. But the question has no application in this case because it omits all phases of the case which would result in an affirmative answer. The first counter-question which we have set forth above should be compared with this question.

It is the position of Respondents that if the Union does the things described for the purpose of promoting the interest of a business group and with full expectancy that the trade of competitors outside of the business group will be seriously restrained or utterly destroyed by reason of severe differences in methods of production; then the acts of the Union would constitute a violation of the Sherman Act. Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services. The same labor union activities may, or may not, be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. **Allen Bradley Company v.**

Local Union No. 3 (1945), 325 U. S. 797, 89 L. Ed. 1939; **United Brotherhood of Carpenters v. United States** (1947), 330 U. S. 395, 91 L. Ed. 973; **Los Angeles Meat and Provision Drivers Union v. United States** (1962), 371 U. S. 94, 9 L. Ed. (2) 150; **United States v. Gasoline Retailers Association, Inc. et al.** (1961, 7th Cir.), 285 Fed. 2d 688; **Local 175 Brotherhood of Electrical Workers v. United States** (1955, 6th Cir.), 219 Fed. 2d 431; **Philadelphia Record Company v. Manufacturing Photo-Engravers Assoc. of Philadelphia** (1946, 3rd Cir.), 155 Fed. 2d 799; **Anderson-Friberg, Inc. v. Justin R. Clary & Son** (1951, S. D. N. Y.), 98 Fed. Supp. 75. If these factors are present (as they are in this case), then merely calling the act of the Union an effort to stabilize wage rates would not remove the Sherman Act prohibitions.

We believe that this is the exact situation that was presented to the Court in **United Brotherhood of Carpenters v. United States**, 330 U. S. 395. As shown in that case, the purposes and the background of the combination and a great divergence in the methods of production of the parties affected by the agreement can make a great deal of difference. But, Petitioner completely ignores and refuses to confront these factors in its petition.

It will be noted that the protective wage clause in the **Carpenters** case is almost identical with the protective wage clause in the National Bituminous Coal Wage Agreement (1205a).

With respect to the portion of the Opinion in the **Carpenters** case dealing with the clear proof rule of Section 6 of Norris-LaGuardia, the clear proof charge was given by the Trial Court in this case (1555a).

The statement made at page 27 of the petition that the contentions made by Respondents in this case would mean that UMW's collective bargaining agreement must be re-

stricted to those terms which the least efficient and the least successful coal operator in the industry could afford, is a much over-simplified argument. A Union with a national contract that bars a single employer or a handful of employers would certainly have no problem under the anti-trust law. But, when a Union designs a national contract which would drive a whole area out of the industry, to which it has been traditionally tied for decades and when the work force suddenly declines from 433,000 men to 160,000, it would seem to be a matter of broad human concern that the Union have the realization that there are "invisible strangers" at the bargaining table (Petition, p. 28) and that a court may very well scrutinize its actions under the Sherman Act.

The exercise of the asserted right to engage in national collective bargaining is the exercise of tremendous power. With such power comes responsibility in preserving, rather than destroying, the free flow of commerce. This should be particularly true in industries where there have been a great number of competing companies, operating in all kinds of different conditions with all sorts of methods of production, and where there arises a tendency, favored by the Union, for the concentration of production into fewer units (408a) "to take over the production" (450a-451a).

We do not undertake to say in this case that Petitioner does not have the power to engage in national collective bargaining. But we do say that Congress has not expressly authorized it to the exclusion of the limitations contained in other statutes such as the Sherman Act. We believe these questions are firmly settled.

II. The Second Question Presented by Petitioner With Respect to the Proof On Activities of Petitioner in the Business Group With Which Petitioner Dealt in Obtaining Minimum Wage Determinations On the TVA Market, Incorrectly Treats This Phase as Being the Whole Conspiracy and Ignores the Significance of Such Proof On the Question of Purpose and Intent to Restrain Trade and Monopolize as to This Largest of the Markets for Coal, Which Was Respondents' Principal Market; the Question Also Ignores the Fact That the Damages Awarded Respondents Were Not Attributable to This Particular Phase of the Proof.

The Tennessee Valley Authority is the largest coal buying consumer in the United States (800a). The TVA steam plant system was developed in the 1950's and the Kingston Plant, the largest in the world, was completed in the vicinity of Respondents' mine in late 1955 (1643a).

The first determination of minimum wage under the Walsh-Healey Act for the coal industry occurred in 1955 and this wage was increased by a determination made in 1958 (1625a-1638a). The desire of UMW that the "established operators" take the TVA coal business and the desire of those major coal combines to get the TVA coal contracts were plainly expressed (992a, 458a, 1636a). These "established operators" did subsequently obtain the largest TVA term contracts (1658a).

The purposes and intents of the proponents of the Walsh-Healey determination were expressed in the speech by the Secretary of Labor in which Mr. Lewis plainly concurred.

This phase of the proof is not related to, nor does the petition discuss, the effort of UMW to eliminate the TVA spot market upon which the Respondent was bidding, and upon which Respondent depended, nor does

the petition discuss the price cutting practices of these "established operators", including the UMW-owned companies, West Kentucky Coal Company and Nashville Coal Company, on the TVA spot market which occupied a very substantial part of the record and from which Respondent suffered its damages.

It would seem to be fundamental fairness and justice that all proof showing the purpose and intent of the alleged conspirators with respect to Respondents' market should be admissible. Because in a conspiracy case such as this, a natural question that arises is, if there was a conspiracy, how did it manifest itself, and what was its effect upon the market being supplied by the complaining party? The activity of the UMW and the major coal producers with respect to this Walsh-Healey minimum wage determination is very pertinent to this very natural question.

The market concerned is a federal government market, just as scores of steam electric generating plants over the country are city government markets. But, being a government market does not make it any the less the objective of those who would monopolize or who would restrain the competition of competitors. The government markets for all industries must be a substantial part of all markets in this day and time, and if the transactions involving the officials who control the buying of goods for those markets do not come under the protection of the anti-trust law and its prohibitions, then there is open invitation to many sorts of conspiratorial and corrupt practices.

The case of **Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.** (1961), 365 U. S. 127, 5 L. ed. 2d 464, upon which Petitioner relies, involved a situation where "all of the evidence in the record, both

oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws" (P. 142).

In the **Noerr** case there is a complete absence of any of the restrictive practices which normally characterize a Sherman Act case such as price-fixing or price-cutting arrangements, boycotts and other similar arrangements (P. 136).

The **Noerr** case did not deal with a market afforded by government purchase and consumption of goods. Where the effort is to capture a market afforded by government consumption, as in the case at bar, one encounters the impossibility of distinguishing the government market from the ordinary private market as far as anti-trust protections are concerned.

The Walsh-Healey Act does not pertain to the regulatory power over private business. Thus in **Perkins v. Lukens Steel Company** (1940), 310 U. S. 113, 84 L. ed. 1108, concerning the Walsh-Healey Act, this Court said at pages 128 and 129:

> "The Act does not represent an exercise by Congress of regulatory powers over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government would permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal."

We do not believe that there is any distinction in anti-trust law between the effort of conspirators to induce the purchasing agent of a private contractor to boycott

the goods of a competitor and the situation where the Secretary of Labor is approached by the conspirators to impose a boycott on the goods of competitors in a government market.

We did not offer the proof with respect to the combination of conspirators to obtain the minimum wage determination under Walsh-Healey for the purpose of challenging the validity of the Walsh-Healey determination or for the purpose of proving any corrupt bargains between the Secretary of Labor and the conspirators. But we did offer it to throw light upon the purpose and intent of the conspirators to restrain competitors and to obtain a monopoly of the TVA market. The case at bar is like **Pfotzer v. Aqua Systems** (C. A. 2d, 1947), 162 Fed. 2d 779. There the plaintiff contracted to install a gasoline aqua distribution system at the Naval Air Station at Pensacola, Florida. The defendant, having a patent upon a particular kind of hydraulic distribution system, sought to force the plaintiff to purchase the defendant's system to install on this job, and it also sought to influence the Naval authorities to keep out any other hydraulic gasoline distribution system besides the one upon which the defendant had a patent. The Trial Court excluded communications between the defendant and Naval authorities which tended to show the effort of the defendant to influence the Naval authorities in this respect. Judge Learned Hand said, at page 785:

> "The correspondence between Kaestner and Wrightson (the Naval purchasing authority), coupled with the Sullivan report, were rationally relevant to the question whether Kaestner and the Aqua Company were trying to influence the Naval authorities to keep out any other hydraulic gasoline distribution system. It was not necessary to prove that there was any corrupt bargain between them; it was enough, if the

correspondence threw light upon the efforts of the Aqua Company, and served to prove they had acquired control, and meant to keep it. That made the correspondence admissible on the issue of monopoly."

III. Question Three Is Merely a Restatement of Petitioner's First Question With the Addition of Certain Evidentiary Matters Presented to the Jury.

We believe that the third question presented by Petitioner is a restatement of the first question, with the addition of certain evidentiary phases of the case inserted in the proof by Petitioner and argued to the jury. The jury rejected the contentions of Petitioner founded upon these matters under a charge which fairly placed these matters in proper focus.

We refer to the material above with respect to the first question in reply to the basic contention that a labor union can never be found in violation of the Sherman Act when it is acting as a collective bargaining agent under the Labor Law.

The third question adds four areas of proof presented in the trial court by Petitioner: (a) that there was an injunctive order requiring Petitioner to bargain at the time of the agreement on March 5, 1950; (b) that the Union officers had denied conspiracy in this case; (c) that there is no direct evidence proving the conspiracy, and (d) that some of the Union's activities were conducted under the procedures and under the jurisdiction of the National Labor Relations Act.

Petitioner does not say that these matters were not properly charged to the jury by the Trial Court. It must be assumed that the jury took these matters into consideration and having done so, found contrary to the position of Petitioner.

We again refer to our counter-statement of question number one to place these various matters in proper context within the overall conspiracy.

We have referred above in the Statement of Facts to the background of the conspiracy and the relationships between the Petitioner and the major coal companies prior to 1950. The injunctive order of the Federal District Court, referred to in Petitioner's Question 3, is part of this background. We believe that our comments under the Statement of Facts above upon this matter are appropriate and correct.

Likewise, we have referred above in the Statement of Facts to the claim of Petitioner that proof of conspiracy has been contradicted by denials of Petitioner's officers. As shown above, these denials were overreaching and were contrary to proven facts in the record. The jury was acting within its prerogative in rejecting such denials contrary to proven facts.

We do not believe that it advances the case of Petitioner to contend that there is no direct evidence of conspiracy in this case. There was just as much direct evidence of conspiracy in this case as there was in the **Carpenters** case, supra.

It is submitted that the following portion of the Opinion of the Court of Appeals (Petition, App., p. 12a) is a correct statement of basic anti-trust law:

> "But it is recognized that conspiracies are seldom capable of proof by direct testimony and it is settled that they may be inferred from the acts of the parties thereto. Circumstantial evidence of the existence of a conspiracy may be sufficiently strong to raise a factual question for the jury, even though there is no direct evidence that a conspiracy existed. It is the

function of the jury to observe the witnesses while testifying, to appraise their credibility, to draw inferences from the facts established, to resolve conflicts in the evidence and to reach ultimate conclusions of fact (citing cases)."

The fourth phase of the proof raised by this question pertains to the circumstance that Petitioner was acting as a collective bargaining agent under the National Labor Relations Act. It is believed that this is merely a restatement of the position taken in the first question by Petitioner and we have responded to that proposition above.

One further point is raised in this question and that is with respect to the clear proof requirement of Section 6 of the Norris-LaGuardia Act. We have already commented upon this above and pointed out that the clear proof charge was given by the Trial Court (1555a).

IV. Petitioner Has Not Undertaken to Give Any Reason for the Issuance of the Writ With Respect to the Fourth Question Presented by Petitioner.

Petitioner does not seriously undertake to discuss the proof or to make any analysis thereof. Petitioner does state that there are a number of other cases which have been brought under the Sherman Act against Petitioner and we do not believe that the fact that other companies have brought such suits can indicate other than that there has been widespread injury resulting from the conduct of Petitioner and that such injury has been such that a number of these companies are willing to undertake the long arduous and expensive road afforded by the Sherman Act. As to whether or not the proof of conspiracy in this case will have any materiality or bearing upon those other cases is, of course, problematical. It is self-evident that each of those cases must stand on the record made

up in each such case. We can state from our own experience in this case that it is a long journey between filing a complaint under the Sherman Act and obtaining a favorable final decree.

In the meantime, it is reasonable to assume that there are a number of parties, employers and employees alike, who are being affected by Petitioner's policies and dealings with the major coal companies. A denial of the writ will make the Petitioner sooner realize the need to give more humane consideration to the "strangers at the bargaining table."

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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